LE COPY

Office Supreme Court, U.S.
FILED
DEC 5 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958.

No. 498.

STEDMAN MANUFACTURING COMPANY,
Petitioner,

v.

FRANK R. REDMAN and REDMAN PROCESS AMERICAN CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respondents' Brief in Opposition.

DEXTER N. SHAW,
123 S. Broad Street,
Philadelphia 9, Pa.
TELFORD TAYLOR,
400 Madison Avenue,
New York, New York,
Attorneys for Respondents.

Of Counsel:
CHARLES H. HOWSON, JR.,
123 S. Broad Street,
Philadelphia 9, Pa.
THORNTON H. BROOKS,
440 West Market Street,
Greensboro, North Carolina

International, 741 So. 50th St., Phila. 43, Pa.

INDEX TO RESPONDENTS' BRIEF IN OPPOSITION.

	Page
QUESTIONS PRESENTED	1
STATEMENT	2
ARGUMENT	13
1. The judgment below, finding respondents' patents valid, is clearly correct and presents no issue which warrants review by this court	13
2. The part of the judgment made binding on the manufacturer is clearly correct and, in any event, is not subject to review by petitioner	17
CONCLUSION	21
APPENDIX	1A

TABLE OF CASES CITED.

	Page
Adams v. Mills, 286 U. S. 397	17
Alemite Mfg. Corp. v. Staff, 42 F. 2d 832 (2 Cir.)	21
Baker v. Gee, 1 Wall. (68 U. S.) 333	20
Cuno Corp. v. Automatic Devices Corp., 314 U. S. 84	16
Duignan v. U. S., 274 U. S. 195	18
Eibel Co. v. Minnesota & Ontario Paper Co., 261 U. S. 45	14, 15
Farmers Loan and Trust Co. v. Waterman, 106 U. S. 265	20
Graver Tank & Mfg. Co. v. Linde Air Prod. Co., 336 U. S. 273	16
Great A. & P. Tea Co. v. Supermarket Corp., 340 U. S. 147	16
Helvering v. Minnesota Tea Co., 296 U. S. 378	17
Interstate Commerce Commission v. Chicago R. I. & P. R. Co., 218 U. S. 88	20
S. S. Kresge Co. v. Winget Kickernick Co., 96 F. 2d 978 (8 Cir.)	20
Merriam Saalfield, 241 U. S. 22	20
Minneapolis-Honeywell Regulator Co. v. Thermoco, 116 F. 2d 845 (2 Cir.)	13, 18, 21
Old Jordan Min. & M. Co. v. Societe Anonyme Des Mines, 164 U. S. 261	18
Regal Knitwear Co. v. Board, 324 U. S. 9	13, 18, 19
Robinson & Co. v. Belt, 187 U. S. 41	17, 18
Sinclair Co. v. Interchemical Corp., 325 U. S. 327	16
Souffront v. La Compagnie des Sucreries de Porto Rico, 217 U. S. 475	17
Tucker v. Ferguson, 22 Wall. (89 U. S.) 527	20

IN THE

Supreme Court of the United States

October Term, 1958

No. 498

STEDMAN MANUFACTURING COMPANY,
Petitioner,

v.

FRANK R. REDMAN AND REDMAN PROCESS AMERICAN CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RESPONDENTS' BRIEF IN OPPOSITION.

QUESTIONS PRESENTED.

The District Court held respondents' patents valid and infringed by petitioner's use of the infringing device. The manufacturer-lessor of the infringing device openly assumed control of the defense; the District Court's findings, conclusions, and judgment were made binding on the manufacturer, and the petitioner's appeal to the Court of Appeals did not challenge this feature of the judgment. The Court of Appeals unanimously affirmed the District Court's judgment. The questions presented by the petition are:

1. Whether the judgment below sustaining the validity of respondents' patents was in fact based on the ground asserted in petitioner's question 2; and

2. Whether the language of the judgment as it may affect the manufacturer should be reviewed by this Court on petition of the infringing user.

STATEMENT.

The action is one for patent infringement, in which respondents charge petitioner with infringement of two patents, Nos. 2,597,528 (Vol. I, 65) and 2,597,530 (Vol. I, 66) (referred to as '528 patent and '530 patent), relating, respectively, to an apparatus and method for producing pre-shrunk tubular knit fabrics.

Frank R. Redman (referred to as Redman) is the owner of the patents, and Redman Process American Corporation (referred to as RPA) has the exclusive right to grant licenses under the patents. Stedman Manufacturing Company (referred to as Stedman) knits and processes tubular knit fabrics and manufactures garments therefrom. Stedman does not make or sell equipment. The charge of infringement is based on the use by Stedman of an apparatus and method for providing pre-shrunk tubular knit fabric.

The apparatus used by Stedman is known as a "Tube-Tex Tensionless Calender" and is manufactured and leased to it by Tubular Textile Machinery Corporation (referred to as Tubular). Tubular openly assumed exclusive control of the litigation through its own attorneys and is paying the entire cost (Finding of Fact 7, R. App. 3A;[1] Vol. IV, 99b-100b; Tr. 874), but is not a party of record to the actions.

1. The appendix to the petition is referred to as "App." and the appendix to this Brief as "R. App.". References to the appendices below and the volume containing certain supplement appendices and the proceedings in the Court of Appeals will be designated as set forth in the foot-note to page 1 of the petition.

Italics and brackets within quotations are ours unless otherwise stated.

The District Judge, after a three-week trial during which he observed the operation of the tensionless calender and the early Tubular machine (and after having spent "that much time studying the record, briefs and requests") (App. A3) entered judgment for respondents, finding infringement by Stedman and holding the patents valid (App. A12). The findings of fact and conclusions of law entered by the District Court are printed as an appendix to this brief (R. App. 2A-25A). The Court of Appeals, by an unanimous decision, affirmed the judgment. A petition for rehearing filed by Stedman was denied.

As stated in the opinion of the Court of Appeals (App. A21): "All are agreed that the problem [of excessive shrinkage upon laundering] had existed for many years and it was conclusively shown in the trial below that it still existed as late as 1949" (Findings of Fact 10-13, R. App. 4A-6A; Vol. VI, 582b-600b, 606b-608b, 629b, 719b). In the petition, reference is made to "the long-existing shrinkage problem of tubular knitted fabrics" (p. 3, ls. 14-15), and the District Court characterized the industry's efforts to solve the problem as "frantic" (App. A3).

Tubular[2] knit fabric following knitting and before wet processing is in a relaxed condition and the stitches are substantially round or circular in shape. During the wet processing which involves bleaching, washing, and the like, the fabric is stretched longitudinally, as a consequence of which "the stitches are distorted from the shape they had after knitting and the fabric as a whole is distorted accordingly, being stretched longitudinally and narrowed transversely or widthwise" (Vol. I, 66, c. 2, ls. 12-16; Vol. V, 251b-252b). In the conventional practice of the prior art, the

2. So termed because it is knit on a circular knitting machine in the form of a tube.

stitches and fabric remain in the stretched distorted condition because, in the calendering (hot pressing) operation, the tubular fabric is pressed and "set" in this condition. Consequently, when such a fabric is laundered, excessive lengthwise shrinkage results because the distorted "set" stitches are released and return substantially to the relaxed condition that existed following knitting and prior to wet processing (Vol. I, 66, c. 2, ls. 16-32).

The apparatus of Redman's '528 patent has become known as a "normalizer" and the method of his '530 patent as "normalizing", because the apparatus and method return the distorted fabric substantially to its relaxed original knitted (normal) form by repositioning the stitches substantially to their round or circular shape which they had following knitting and prior to wet processing (Vol. I, 65, c. 3, ls. 2-12; Vol. V, 253b-255b). Consequently, the excessive shrinkage, present in the conventionally processed fabric, is eliminated and a *pre-shrunk* tubular knit fabric is obtained.[3]

Tubular knit fabric which has been elongated lengthwise and narrowed widthwise by processing subsequent to knitting and the stitches of which are distorted lengthwise and widthwise, is subjected by the apparatus of the '528 patent to a series of three cooperating mechanisms which perform the three interacting method steps of the '530 patent: first, to a mechanism constructed and functioning to move the tubular knitted fabric lengthwise to and through a treatment zone while the fabric is free lengthwise to shorten or condense; second, to an expanding device in the treatment zone which operates internally of the tubular fabric to expand it widthwise and shorten it lengthwise to

3. "Normalizing" provides for tubular knit fabrics what "Sanforizing" provides for woven fabrics.

an extent that, when the fabric is subsequently relaxed, the stitches are repositioned substantially to their original knitted form and the fabric is restored substantially to its normal condition; and third, to fabric handling means[4] constructed and functioning to cause the fabric to relax and seek its own equilibrium (Vol. V, 263b-264b, 272b). Relaxation of the fabric can take place because the fabric is not pressed and "set", thereby affording the fabric freedom, both lengthwise and widthwise, and permitting the unset stitch yarn to "flow" and return the stitches substantially to their original knitted form (Vol. V, 280b-281b).

The foregoing may be readily understood by reference to the first sheet of the drawing of the '530 patent (reproduced in the appendix to this brief; R. App. 1A). Fig. 1 illustrates the relaxed stitches following knitting and prior to processing and the rectangle in Fig. 1A schematically represents a portion of the relaxed fabric at the same stage. Figs. 2 and 2A show the stitches and fabric after wet processing during which they were stretched in length and narrowed in width. Figs. 3 and 3A illustrate the condition of the stitches and fabric during the widthwise expansion while the fabric is free to shorten lengthwise. This is a condition just opposite from that shown in Figs. 2 and 2A. When the fabric is relaxed both lengthwise and widthwise from the condition shown in Figs. 3 and 3A, the stitches return substantially to their original knitted form and the fabric is restored substantially to normal. Figs. 4 and 4A show the condition of the stitches and the fabric after relaxation following the widthwise expansion, substantially as they were in Figs. 1 and 1A (Vol. I, 66, c. 4, l. 34 to c. 5, l. 35; Tr. pp. 154-160).

4. No mention is made in the list of parts on page 4 of the petition of this "fabric handling means permitting the fabric to relax". None of the parts of the prior art listed functions to cause or permit relaxation of the fabric.

With reference to the prior art, petitioner abandoned in the Court of Appeals all of the prior art except the early machines of Tubular, said to be described in Tubular patents Nos. 2,187,644 [5] and 2,228,001. From the statements in the petition with respect to the early Tubular machines (pp. 3-5), one might conclude that such machines were of similar construction and operated in a similar manner to the apparatus and method of the Redman patents.

But this is not so. The earlier Tubular machines were designed to provide a specified yield of fabric (i.e., predetermined width and length) through control of mill shrinkage by regulation of the tension, both lengthwise and widthwise, and then pressing the fabric to "set" it at those dimensions by the calender (hot pressing) rolls of the machine (App. A20, Finding of Fact 34, R. App. 12A-13A; Vol. II, 397, p. 5, c. 1, ls. 51-54; Vol. VII, 15-16; Vol. IV, 205b-206b; Vol. V, 472b, 475b, 481b, 450b, 533b-534b). "Setting" of the fabric effected a binding or interlocking of the stitches, with the result the stitch yarn was not free to "flow" (Vol. V, 539b). Hence, the fabric could not relax and remained in its distorted condition, due to the distorted form of the "set" stitches (Vol. V, 531b, 538b). These distortions and tensions were not released until the garment made from the distorted fabric was laundered, resulting in the excessive shrinkage long encountered in the art. Tubular, in its later '345 patent directed to the tensionless calender [6] used by Stedman, acknowledged this standard procedure, by stating (Vol. I, 213, c. 1, ls. 12-16):

---

5. This patent was not set up as a defense by petitioner, was not relied upon by petitioner at the trial in the District Court and no testimony was given with respect thereto.

6. The tensionless calender is the subject of Tubular's later patents Nos. 2,589,344 and 2,589,345, and was developed and aggressively promoted by Tubular *after* it had learned the details of Redman's apparatus and method (App. A8-A10).

> "This procedure stretches, presses and prevents any shrinkage of the fabric during the operation. Consequently, when a garment cut from the fabric is laundered, shrinkage occurs with resulting distortion of the garment."

Likewise, during the prosecution of the later Tubular patent '345, in differentiating the tensionless calender from the earlier '644 patent, Tubular stated:

> "Furthermore, the patent, ['644] to accomplish its purpose, depends upon the use of the finishing rollers or calender rolls, which subject the fabric to rolling pressure equivalent to ironing."

and

> "It has always been considered necessary to maintain longitudinal tension in the fabric, to apply calender rolls thereto, and to wind the fabric under a degree of longitudinal tension." (Vol. VII, 15-16).

The crux of the inventions of the patents in suit is the combination and interaction of the means and steps of expanding the distorted tubular fabric widthwise while it is free lengthwise, followed by relaxation of the fabric to reposition the fabric stitches substantially to their original knitted form and to restore the fabric substantially to its normal condition (Vol. I, 67, c. 3, ls. 8-17; 65, c. 3, ls. 12-17; Vol. V, 253b-255b). Contrary to petitioner's assertions (pp. 4, 5), this combination and interaction was not embodied in the earlier Tubular machines or in any other prior machine or method and was not disclosed in the prior '644 and '007 patents or any other patent (Findings of Fact 33-56, R. App. 12A-24A; Vol. V, 526b-552b).

This is a complete answer to petitioner's claim (pp. 5, 7, 9, 10) that the Courts below sustained the patents on

the basis of the results achieved, rather than on fundamental differences over the prior art. The opinions below and the findings of fact entered by the District Court show that both Courts carefully considered the structures and methods of the prior art and found them lacking.[7] Likewise, there is no basis for petitioner's contention (pp. 3, 9-11) that the opinion of the Court of Appeals shows that there was substantial identity between the prior art Tubular machines and the Redman patents, nor for petitioner's assertion that the Court of Appeals bottomed its conclusion upon a "'small advance' * * * in a technique 'previously employed' ". What the Court said was:

> "It *may seem* to involve so small an advance over the control of longitudinal tension previously employed as to have been obvious to the industry, but actually it was only after a long period of experimentation that it was hit upon and then widely approved." (App. A26)

What the industry was seeking, and had not found prior to Redman, was a means and method of obtaining a pre-shrunk tubular knit garment, that is, a garment whose shrinkage upon laundering has been reduced to such an unobjectionable percentage that the garment will be shrink-resistant and can be sold under an appropriate guarantee against such shrinkage. For the first time, it is possible to market a pre-shrunk knitted garment—a truly new product—and the Redman licensees and lessees of Tubular's tensionless calender now sell their garments as "Guaran-

---

7. The District Court made its findings and rendered its opinion after examining the tensionless calender and the earlier Tubular machine in operation and at rest. Contrary to petitioner's contention (p. 5), the District Court made a full and careful consideration of all defenses asserted against validity of the Redman patents (see Findings of Fact 33-56, R. App. 12A-24A).

teed not to shrink out of fit"; "They never shrink out of fit"; "Keeps its fit even after countless washings" (Vol. IV, 37b-40b, 50b-52b, 84b-93b, 113b-114b; Vol. V, 491b-495b; Vol. VI, 637b-639b, 642b, 643b, 655b, 668b).

Taking the experience of Stedman as typical, the lengthwise shrinkage of its T-shirts after one wash was in the range of 11%-13% (line dried) using the prior processing procedure (Vol. IV, 112b), whereas with the tensionless calender, the shrinkage is reduced to 3% or less (Vol. V, 498b-501b).[8] When asked if a garment with shrinkage of 11%-13% could have been sold under the guarantee now used by Stedman: "Will not shrink out of fit", Mr. Stedman replied: "For the fabric which I have just mentioned I would say very definitely not" (Vol. IV, 112b). See also the experience of Perry Knitting (Vol. IV, 33b-38b), Beaunit Mills (Vol. IV, 45b-47b), Ashland Knitting (Vol. IV, 58b-62b), Richland Knitting (Vol. IV, 54b-57b), and Burkey Underwear (Vol. IV, 66b-70b).

---

8. Petitioner (foot-note p. 5) refers to the shrinkage of "less than 2%" mentioned in the Redman patents and compares this with a figure of 10%. Such comparison is completely unjustifiable. The record discloses that there are three methods of drying fabrics to determine shrinkage upon laundering, namely, line dried (dried hanging on a line), screen dried (dried on a flat screen at rest), and tumble dried (dried in a tumble drier, roughly tumbled about and compacted). The line dried and screen dried figures are comparable, but the figure for tumble drying is much higher due to the very severe treatment given the fabric (Vol. V, 464b-466b). The 2% figure given in the patent is for a screen dried fabric, whereas the 10% figure is for tumble drying. It is necessary, of course, in comparing figures that the same type of drying shall have been employed. For example, "Sanforized" woven fabrics, guaranteed not to shrink more than 1% (line or screen dried) have a shrinkage figure of as much as 8% when tumble dried (Tr. 642). What was discussed in the transcript cited by petitioner was a "before and after" Redman comparison of 20% before and 10% after (tumble dried) and 12%-20% before and less than 5% after (line or screen dried) (Tr. 1514-1515).

As the President of the Underwear Institute (which had sponsored Redman's shrinkage work from 1945 to 1951) stated upon dissolution of the Redman Trust following introduction of Tubular's tensionless calender (Vol. VI, 580b-581b):

> "The Underwear Institute and the Contributors of the Redman Trust can take pride in the fact that they were the *first in the field to sponsor and develop methods of preshrinking for knit goods.*"

There is no basis, therefore, for petitioner's assertion (P. 5-6) that Redman's improvement was merely a matter of degree and that the problem of excessive shrinkage has not been solved.

Nor is there basis for petitioner's further contention that the earlier Tubular machines were "designed, among other things, to restore the fabric tube to its original condition, and thus to reduce shrinkage in the finished garment." Such contention is fully answered by the experience of the industry, as shown by Tubular's own statements. Thus as Tubular stated in its later '344 patent directed to the tensionless calender, the object is to provide a fabric which is not "subject to substantial additional shrinkage as a result of laundering, *an object which has long been considered desirable but heretofore has not been attainable in the treatment of tubular textile fabrics*" (Vol. I, 215, c. 1, ls. 29-31). Tubular's other later patent '345 also emphasizes: "*This object* [the provision of a fabric not "subject to further substantial shrinkage"] *has been needed in the industry but never heretofore obtainable*" (Vol. I, 213, c. 1, ls. 27-28).

Because the earlier Tubular machine failed to reduce shrinkage, Tubular found it necessary, following Redman,

to develop its new tensionless calender, as to which Tubular has stated in its advertisements (Vol. V, 461b-462b):

> "When it is necessary to control or reduce residual shrinkage, the Tube-Tex Tensionless Calender should be used. This machine uses a patented driven propeller spreader of somewhat different design than the straight-line calender. The principle in this machine is the complete relaxation of the fabric. By accomplishing this, residual shrinkage is substantially reduced."

Despite the fundamental differences in theory and practice discussed above, petitioner contends (pp. 5-6) that the only difference between the operation of the early Tubular machines and the Redman patents lay in the fact that respondents' patents emphasized the practice of extreme widthwise spreading. This contention was pressed at the trial and in the Court of Appeals and was disposed of by the District Court in Findings of Fact 21 and 22 (R. App. 8A-9A) and by the Court of Appeals in the last two paragraphs of the opinion (App. A27-A28). In both Courts, the necessary combination and interaction of widthwise expansion and subsequent relaxation were stressed, contrary to petitioner's statement (p. 9). Petitioner's reference (p. 5) to "wide-spreading" in connection with infringement and with the disclosure of Tubular's later '344 and '345 patents completely disregards the evidence that, to eliminate excessive shrinkage, Tubular and its lessees find "widespreading" (with subsequent relaxation) to be essential (Vol. VI, 658b, 723b, 725b-728b; Vol. V, 315b-321b, 507b- 508b).

It has been shown that the premise upon which the petition is based is not factually correct. The earlier Tubular machines were not designed "to restore the fabric tube

to its original condition, and thus to reduce shrinkage in the finished garment" (p. 3) and they did not embody or disclose "the same basic parts, operating in the same sequence and in the same basic way to accomplish the same end", as the tensionless calender (or the Redman patents) (p. 3).

ARGUMENT.

The trial in the District Court involved questions of validity and infringement. The Court of Appeals' opinion deals exclusively with these matters. Petitioner points to nothing which would warrant this Court's review of the decision below on the validity of respondents' patents, based as it is on a voluminous record and extensive argument and embodying the considered conclusions of the trial judge and three appellate judges.

The judgment enjoins petitioner from continuing to use the infringing device, and orders reference to a master to ascertain the damages for which petitioner is liable by reason of its infringing use. Thus, the impact of the injunction on the manufacturer (who, as petitioner concedes, openly controlled the defense) is a matter of no concern to the petitioner. *Minneapolis-Honeywell Regulator Co. v. Thermoco*, 116 F. 2d 845, 847 (2 Cir.) No doubt for this reason, petitioner failed to make timely objection to that part of the judgment which is made binding on the manufacturer, either in the District Court or the Court of Appeals. Furthermore, petitioner's present criticism of the judgment reflects only an "abstract" controversy. *Regal Knitwear Co. v. Board*, 324 U. S. 9, 15-16. Plainly, petitioner is now challenging this feature of the judgment only in order to exploit a purported (but actually non-existent) conflict with decisions in other circuits, in an effort to persuade this Court to review the validity of the patents.

1. *The judgment below, finding respondents' patents valid, is clearly correct and presents no issue which warrants review by this Court.* Petitioner's challenge to the validity of respondents' patents is now limited, as appears from question 2 of the petition (p. 2), to the contention that the patents embody "an old combination of old elements and

steps", and that the Court of Appeals erroneously held such an "old combination" patentable "merely because the claimant's apparatus and method improved, in degree, the old result".

As has been shown in our statement (*supra*, pp. 2-12), there is no factual basis for the argument that the Redman patents embody only "an old combination of old elements and steps". Nor has petitioner accurately stated the basis of the Court of Appeals decision. On the contrary, its opinion stressed (pp. A20-A21) the discovery of a new apparatus and process to eliminate shrinkage of the fabric "after it was processed" (as distinguished from "mill shrinkage") by restoring the stitches substantially to their original knitted form. Far from being an "old combination of old elements and steps", the new apparatus and process, according to the Court of Appeals (p. A26) was found by Redman "only after a long period of experimentation", and represented "a practical improvement of great value".

Petitioner's contention that the Court of Appeals "misconstrued the governing decisions of this Court" is derived principally from the lower Court's reliance on *Eibel Co. v. Minnesota & Ontario Paper Co.*, 261 U. S. 45, and petitioner's claim that the Court ignored later decisions of this Court.

In the *Eibel* case, the paper industry had endeavored for years to increase the speed of paper machines. Eibel accomplished this, using an arrangement by which the pitch of the paper-making wire was increased to a greater extent than previously. In the prior practice, the pitch had been increased, but the increase had been for "a different purpose", namely, to control drainage. For this reason, the Court stated that Eibel's invention was "directed

toward a wholly different object from that of the prior art". The Court found such departure from the art not "a mere matter of degree" and sustained the patent.

Here the knitting industry had sought in vain for means to eliminate the excessive shrinkage in tubular knit goods. Redman accomplished this by a new means and method not previously used for *any* purpose. Thus, in the present case, the departure from the prior practice is even more marked than in the *Eibel* case.

As in the *Eibel* case, Redman's inventions were clearly "for a different purpose" and were "directed to a wholly different object from that of the prior art" and were not "for a mere matter of degree". The purpose of Redman was to eliminate the excessive shrinkage on laundering by relaxation of the fabric after it had been expanded to re-position the stitches and thus to restore the fabric to its normal condition. This purpose was recognized by the Court of Appeals (A17, last paragraph), and it emphasized the importance, in connection with the other elements, of the "fabric handling means permitting the fabric to relax" (A18).

In contrast to this, in the prior practice the purpose was to reduce mill shrinkage by controlling tension on the machine, both lengthwise and widthwise, followed by "setting" the stitches (*supra* p. 6). This was specifically pointed out by the Court of Appeals when it stated that, in the prior Tubular machines, the fabric "is carried to the finishing rolls where it is pressed flat and *set* at the width to which it has been spread", and that in such machines "The fabric attains and *retains* the final permanent width and length and it passes the finishing rolls and is wound up" (A18-A19). Consequently, as the Court of Appeals held, the prior Tubular patents "obviously relate to what is called mill shrinkage which occurs during the finishing

operations and not to the shrinkage of articles manufactured from the fabric" (A20-A21). In the same connection, the Court stated: "The evidence in the case, however, demonstrates quite clearly that the harmful shrinkage of garments made from the fabric *after it was processed in* these machines was in fact not eliminated" (A20-A21; emphasis the Court's).

With respect to *Cuno Corp. v. Automatic Devices Corp.*, 314 U. S. 84, *Sinclair Co. v. Interchemical Corp.*, 325 U. S. 327, and *Great A. & P. Tea Co. v. Supermarket Corp.*, 340 U. S. 147, cited by petitioner (pp. 10, 11), the evidence and the opinions below show clearly that Redman's inventions were *not* a combination of old elements and steps (*A. & P.*) and were *not* "plainly indicated by the prior art" (*Cuno*), but rather constituted a "discovery" comprising a new combination and interaction of mechanisms and steps which did "add to the sum of useful knowledge" (*A. & P.*) and which the "art", by its substantial adoption of Redman's inventions, "recognized as an advance" (*A. & P.*) and a "substantial innovation for which society is truly indebted" (*Sinclair*). See also *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U. S. 273, 274 (1949).

Petitioner's contentions (pp. 7, 9-11) as to what the Court of Appeals below did or did not do or say are fully answered by the foregoing Statement (see *supra* pp. 2-12) and by the opinion of that Court.

Both Courts below sustained the patents because Redman had proceeded contrary to the long-established practices of the art, as typified by the early Tubular machines, and had devised an apparatus and method by which a concept, new in the art, has been put to practical commercial use. Petitioner has presented no valid reason why the writ should be granted.

2. The part of the judgment made binding on the manufacturer is clearly correct and, in any event, is not subject to review by petitioner. The petitioner, a lessee and user of the infringing device, concedes that the manufacturer-lessor (Tubular) openly assumed control of the defense in this action (Pet. pp. 2, A11, A15). Accordingly, the District Court's judgment was made binding on Tubular, in accordance with the well-established principle that one who openly conducts the defense of an action in aid of some interest of his own "is as much bound by the judgment * * * as he would be if he had been a party to the record." See *Souffront v. La Compagnie des Sucreries de Porto Rico*, 217 U. S. 475, 486-87.

Petitioner apparently does not challenge the trial Court's finding that Tubular is bound by the judgment, but takes exception to the form of that portion of the judgment relating to Tubular. But no such objection was raised in the District Court against this part of the judgment. No such objection was mentioned among the several questions stated in petitioner's brief in the Court of Appeals,[9] nor is this point anywhere mentioned in that court's opinion. Since petitioner has failed to make timely objection to the form of the decree in either the District Court or the Court of Appeals, the matter cannot now be raised in this court. *Adams v. Mills*, 286 U. S. 397, 416-17; *Helvering v. Minnesota Tea Co.*, 296 U. S. 378, 380; *Robinson & Co. v. Belt*, 187

9. Paragraph 2(b) of Rule 10 of the Court of Appeals for the Fourth Circuit requires that the appellant's brief shall contain "A brief statement of the case together with a succinct statement of the questions involved, separately numbered, and the manner in which they are raised in the record." Paragraph 8 of Rule 10 declares that "Points not argued in the briefs will be deemed abandoned and may not be argued orally except by permission of the court." There was no such permission or oral argument in this case.

U. S. 41, 49-50; *Duignan v. U. S.*, 274 U. S. 195, 200; *Old Jordan Min. & M. Co. v. Societe Anonyme Des Mines*, 164 U. S. 261, 264-5.

In a footnote in its petition for rehearing in the Court of Appeals, petitioner for the first time adverted to the form of that part of the decree relating to Tubular. Whether or not this was a belated effort to raise the point in the Court of Appeals with an eye to its availability as a ground for a subsequent petition for certiorari,[10] the phrasing of the footnote plainly manifests petitioner's own lack of "concern" with the question.[11]

But even if petitioner had sought to make timely objection on this ground, the fact remains that it has no legal interest, and that there is no justiciable issue between petitioner and respondents presented by this matter. *Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc.*, *supra*, p. 847. In *Regal Knitwear Co. v. Board*, 324 U. S. 9, where the petitioner objected to an order of the National Labor Relations Board insofar as it sought to bind not only the petitioner but also the petitioner's "successors and assigns", this court declined to strike the quoted words, on the ground that the case presented only an "abstract controversy", saying (324 U. S. at 15-16):

---

10. Of course, such belated and casual mention of this point in the petition for rehearing did not in any respect comply with the provisions of Rule 10 of the Court of Appeals, and does not make the question available for review here on certiorari.

11. The footnote in question reads as follows (petition for rehearing in the Court of Appeals, p. 2): "While it openly controlled the Stedman defense, Tubular is not a party to this action, has never been served, and has never appeared. It is perfectly clear, therefore, that the District Court was without jurisdiction to act directly against Tubular in this case. This Court may deem it appropriate to correct this elementary flaw, which we note only in passing since our concern is with more crucial errors and inadequacies in the judgment.

"No concrete case is before us. We have here an abstract controversy over the use of these words, and it is as sterile as abstract controversies usually are. The employer objects to the words of the order merely as words. They do not enlarge its own obligation, and if it complies with the order, little by way of obligation could be passed to a successor or assign by the order that is not in any event imposed by statute. The Board is not here attempting to reach or to hold anyone in contempt by virtue of such orders. No successor or assign appears before us complaining that these words put him in jeopardy. No one can be punished for contempt because of these words until after a judicial hearing, in which their operation could be determined on a concrete set of facts. All that is before us is the question whether we will hold abstractly that this provision is an illegal one to include in a cease and desist order of the Labor Board or an enforcement order of the Court."

Similarly, in the present case there is no justiciable controversy before the Court. Insofar as the judgment binds Tubular, there may or may not arise in the future a controversy between Tubular and the respondent with respect to the effect of the judgment below on Tubular. But there is no such controversy presented here. Petitioner cannot be heard to complain about the effect of the judgment on Tubular,[12] under the *Regal* case, *supra*, and numerous other decisions wherein this Court has declined to consider alleged errors, in the disposition of which the com-

12. In the *Regal* case, the petitioner asserted a legal interest on the ground that the effect of the injunction on "successors and assigns" might hamper the petitioner in selling his business. But no such interest can be asserted by the petitioner in the present case, for the binding effect of the judgment on Tubular cannot possibly affect the value of petitioner's own business.

plaining party had no interest. *Interstate Commerce Commission v. Chicago R. I. & P. R. Co.*, 218 U. S. 88, 109; *Farmers Loan and Trust Co. v. Waterman*, 106 U. S. 265, 269-71; *Tucker v. Ferguson*, 22 Wall. (89 U. S.) 527, 571; *Baker v. Gee*, 1 Wall. (68 U. S.) 333, 337.

As stated above, it seems plain that this objection to the form of the judgment relating to Tubular has been tardily raised by the petitioner in the hope that this Court may thus be induced to review the entire judgment, including the validity of the respondents' patents, for the infringement of which petitioner has been held liable. To this end, petitioner seeks to invoke a purported conflict with this Court's decision in *Merriam v. Saalfield*, 241 U. S. 22, and with decisions in the Second and Eighth Circuits.

In fact, there is no such conflict. *Merriam v. Saalfield, supra*, was an unfair competition suit against a distributor of dictionaries. The publisher of the dictionary participated in the defense, but this was unknown to the plaintiff until after entry of the decree against the distributor. The plaintiff and defendant then settled their differences, and *thereafter* the plaintiff sought to hold the publisher liable in damages, in an ancillary proceeding. Since the publisher had not openly assumed control of the defense, the District Court held that he was not bound by the judgment. This Court sustained the ruling below, on this ground and for the additional reason that an ancillary proceeding for past damages required personal service on the publisher, which had not been had. The decision has no application here, since Tubular openly conducted the defense throughout the trial, and the judgment does not seek to assess damages against Tubular.

Petitioner relies on *S. S. Kresge Co. v. Winget Kickernick Co.*, 96 F. 2d 978 (8 Cir.), but that case, like the *Merriam* case, also involved an accounting for past dam-

ages. Petitioner's brief also cites [13] the *Minneapolis-Honeywell* case, *supra*, but this decision as already noted, stands athwart petitioner's effort to challenge the application of the judgment to Tubular.

In summary, petitioner did not make timely objection to the part of the decree relating to Tubular, has no legal standing to challenge this feature of the judgment, and has failed to set forth anything which would warrant review of that part of the decree by this Court.

CONCLUSION.

The decision below is correct, no important question warranting further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

DEXTER N. SHAW,
123 S. Broad Street,
Philadelphia 9, Pa.,
TELFORD TAYLOR,
400 Madison Avenue,
New York, New York,
Attorneys for Respondents.

Of Counsel:

CHARLES H. HOWSON, JR.,
123 S. Broad Street,
Philadelphia 9, Pa.,
THORNTON H. BROOKS,
440 West Market Street,
Greensboro, North Carolina.

13. The other decision from the Second Circuit cited by petitioner, *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832, has nothing to do with the problem here under discussion.